No. 15465

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES CALEB SANDNER, JR.,

Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

Appeal From Judgment of the District Court for the Southern District of California, Central Division.

BRIEF FOR DEFENDANT-APPELLANT.

EDGAR G. WENZLAFF,
417 South Hill Street,
Los Angeles 13, California,
Attorney for Defendant-Appellant.

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Statement of the Case—Questions Involved.

I.

Was the denial of the full conscientious objector status by the Selective Service Appeal Board to appellant without basis in fact, arbitrary and capricious?

Trial Court says "No".

The Government says "No".

The appellant says "Yes".

II.

Was appellant illegally denied his right to an investigation, a hearing, a report by a hearing officer and a recommendation by the Department of Justice to the Board of

Appeal upon the conscientious objector claim contrary to Section 6(j) of the Act and Section 1626.25 of the regulations on his third appeal?

The Trial court says "No".

The Government says "No".

The appellant says "Yes".

Nature of the Action.

This is a criminal appeal and a draft law prosecution. Appellant seeks a review of his conviction and sentence of one year in the custody of the Attorney General for refusal to submit to induction into the Armed Forces of the United States. The indictment charged that appellant violated the Selective Service Act (U. S. C., Title 50, App., Sec. 462, Universal Military Training and Service Act). It is alleged that he refused to submit to induction.

On June 18, 1956, appellant was arraigned. He pled not guilty and waived the right of trial by jury. On October 18, 1956, the case was called for trial. The entire draft board file was received into evidence. At the close of the evidence by the Government appellant made a motion for judgment of acquittal. The motion was argued. The Court denied the motion. The Court found the defendant guilty as charged. Judgment and Sentence were entered November 5, 1956, committing the appellant to an institution to be designated by the Attorney General for a period of one year.

Notice of Appeal was timely filed. Bail was fixed at $2500.00. That defendant has stay of execution until November 19, 1956. Petition for Modification of Sentence was filed November 14, 1956, and duly denied.

Statement of Facts.

James Caleb Sandner, Jr., was born June 21, 1930. On September 18, 1948, he registered with Local Board No. 11, at Newport, Kentucky. On July 1, 1949 the local board mailed him the Classification Questionnaire which was filled out and returned by him on July 10, 1949 and received by Local Board July 11, 1949.

In the Questionnaire he showed his name, birth date and birth place. He gave his address. He showed he was a full time student attending the University of Kentucky at Lexington, Kentuck majoring in a pre-law course.

He signed the conscientious objector blank in the Classification Questionnaire. He claimed classification as VI-E and was classified on August 3, 1949 as IV-E. He was then attending classes at the University of Kentucky.

In his "Special form for conscientious objector" filed July 13, 1949, he wrote that because of his belief in God's word as my superior authority and guide, I recognize Jehovah God and Christ Jesus as the Higher Powers and I am subject to their laws before all others of human relations. In my belief God's laws must be obeyed first.

He stated that he had studied the last ten years with the Covington, Kentucky Company of Jehovah Witnesses, under the direction and affiliation with the corporation known as the "Watchtower Bible & Tract Society, Brooklyn, N. Y." He stated that under no circumstances whatsoever do I believe in the use of force. He proved the depth of his conviction and sincerity. He stated, I have attended Bible studies, attended a course of Ministry at the local headquarters of our organization for about five years, have given public lectures pertaining to facts and doctrines of the Bible. I have given approxi-

mately 50 public Bible lectures, preaching orally from house to house in different locations throughout this area. I have written proof from the University of Kentucky that I have been exempt from all forms of militarism at this institution.

He states that he has baptised at a Convention of Jehovah Witnesses at Detroit, Michigan in 1940. He states that his parents are members of Jehovah Witnesses.

He states that the Bible states in many places that Christ was neutral towards nations when on earth, therefore his followers are instructed to do likewise in all affairs pertaining to things of this world. That his creed and authority is from the Bible.

He listed the schools he attended, specifying names and addresses.

He specified the names and addresses of his employers. He listed his places of residence, past and present. He gave the names of several persons as references.

The Local Board, on August 3, 1949 classed Sandner as a conscientious objector. He was placed in Class IV-E. On August 31, 1949 the Local Board classified him as I-A *without notice*. He was notified to appear before the Local Board September 21, 1949 and did appear before the Local Board September 28, 1949, with his father, who is also a member of Jehovah Witnesses. He based his conscientious objections on Bible passages, such as "Thou shall not kill." "He who lives by the sword shall die by the sword." The Board found no grounds, it stated, to change his classification from I-A. On October 9, 1949, Sandner wrote a letter requesting appeal. On February 23, 1951, he was classified I-A and referred to District Attorney. On April 12, 1951 he was classified I-A by Appeal Board.

On March 27, 1951, the hearing officer Ben L. Kessinger wrote a report to the Honorable Peyton Ford, Deputy Attorney General, Washington, D. C., regarding defendant-appellant, which was based substantially upon the F. B. I. report, a résumé of adverse or favorable evidence not being furnished to appellant. Peyton Ford, the Deputy Attorney General, did on April 11, 1951 write the Appeal Board concurring in the recommendation of the hearing officer, and citing the F. B. I. report that defendant-appellant was employed by a brewery and was known to drink to excess at times and was "wild". That he was irregular in his attendance at meetings of the Jehovah Witnesses. He was arrested once for disorderly conduct arising out of a traffic violation. He was involved in an altercation at a dance at Lexington, Kentucky with another boy and prevailed in the fisticuffs. That he is not a preacher but is desirous of studying law.

On May 8, 1951 appellant requested an appeal to the Presidential Appeal Board which was denied.

On August 2, 1951 appellant was ordered to report for Armed Forces Physical Examination on August 13, 1951, examined and found acceptable. On September 6, 1951 he was ordered to appear for induction September 21, 1951. This Order for Induction was on September 19, 1951 postponed until end of academic year of school in Santa Monica, California. On July 8, 1952 request for transfer from Covington, Kentucky to Local Board No. 106, 1200 South Santee Street, Los Angeles, California was made.

On July 11, 1952 he was transferred for induction to Local Board 106, 1200 Santee Street, Los Angeles, California. He was served with order to report for induction and on July 28, 1952 he refused to be inducted into

the Armed Forces of the United States. On October 16, 1952 Santa Monica City College advised Local Board No. 11 at Newport, Kentucky that he is no longer enrolled with them.

On April 6, 1953 a letter from National Headquarters of Selective Service System was sent to State Director of Selective Services System at Louisville, Kentucky, advising that the Notice Form SSS 110 had not been mailed to defendant on change of classification on June 18, 1952 and on August 3, 1949, two separate and distinct times which procedural errors show on page 8 of the Minutes of the Boards in registrant's file.

Defendant was indicted for Violation of U. S. C., Title 50 App., Section 462—Selective Service Act of 1948 which indictment was filed September 4, 1952 that he knowingly refused to be indicted into the Armed Forces of the United States. The case was called for trial April 13, 1953 and dismissed by The Honorable Judge William C. Mathes, District Judge for the Southern District of California, Central Division, at the request of the Government, on the ground that procedural rights were denied defendant, for not sending him Notice of Change of Classification Form SSS 110 and failure to produce the F. B. I. report of defendant.

That on June 8, 1953 he filed his special form for Conscientious Objector with Local Board No. 11, Newport, Kentucky setting forth substantially same reasons as set out in his first Conscientious Objector form hereinabove mentioned, together with a long letter dated June 3, 1953 attached thereto giving his religious beliefs as a Jehovah Witness to sustain and support such beliefs as a Conscientious Objector.

He was again classified as I-A and noticed under SSS Form 110, June 18, 1953. On June 25, 1953 defendant-appellant requested an appeal for a personal hearing before the Local Board who directed him to appear at Newport, Kentucky, July 15, 1953. He then requested a hearing before the Local Board in Los Angeles, California, which was denied.

On August 13, 1953 appellant was given a courtesy interview by Local Board No. 95 in California which was transcribed and sent to his Local Board in Kentucky. Affidavits from three different witnesses were attached showing the sincerity and good faith of appellant.

On September 9, 1953, he was classified again as I-A by the Local Board in Kentucky from which classification he appealed September 17, 1953 asking to be classified as I-O. On September 30, 1953, the cover sheet of appellant was sent to State Headquarters for Selective Service Commonwealth of Kentucky by the State Director of Manpower of Kentucky requesting that it be forwarded to the United States Attorney for a recommendation by the Department of Justice according to Section 1626.25 of Selective Service Regulations so that defendant could not contend that an error was made in not procuring a recommendation from the Department of Justice.

On August 17, 1954 hearing was had before hearing officer Mr. Euler appointed by Department of Justice in Los Angeles, California.

On January 12, 1955 appellant received notice from appeal board classifying appellant I-A. On February 10, 1955 cover sheet of Registrant was sent to Director National Headquarters calling attention to résumé of the Investigator's report dated December 6, 1954 but no copy was sent appellant for the hearing of August 17, 1954.

On May 4, 1955 Local Board in Kentucky reopened case of appellant of its own motion and sent appellant Notice form 110 classifying appellant I-A.

On May 11, 1955 appellant gave notice of appeal requesting appearance before board and enclosing new and additional evidence to the Local Board in the form of a certificate from his Congregational Head that he was in good standing as a Jehovah Witness which was forwarded to the appeal board.

On May 21, 1955 received Notice to appear June 8, 1955 before Local Board No. 11 at Newport, Kentucky.

On June 1, 1955 appellant asked for hearing before Local Board in Los Angeles which was denied June 9, 1955.

On June 17, 1955 mailed formal notice of appeal.

On July 20, 1955 for the first time appellant received copy of Department of Justice recommendation dated December 6, 1954.

On August 15, 1955 appellant sent long letter to appeal board refuting Department of Justice recommendation of December 6, 1954.

On September 28, 1955 received form No. 110 from Appeal Board classifying appellant I-A.

On November 23, 1955 Order transferring appellant to Los Angeles, California for induction filed.

On December 5, 1955 appellant refused to be inducted into the Armed Forces of the United States.

On May 23, 1956 Indictment was found against appellant.

On October 18, 1956 case called for trial and appellant found guilty.

ARGUMENT.

QUESTION ONE.

Was the Denial of the Full Conscientious Objector Status by the Selective Service Appeal Board to Appellant Without Basis in Fact, Arbitrary and Capricious?

The Trial Court says "No".

The Government says "No".

The appellant says "Yes".

There was no basis in fact for the denial of the claim for classification as a conscientious objector against combatant and noncombatant military service made by appellant.

Section 6(j) of the act (50 U. S. C. App. Sec. 456(j), 62 Stat. 609) provides:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such non-

combatant service, be deferred. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such persons shall be notified of the time and place of such hearing. The Department of Justice shall after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."

Section 1622.14 of the Selective Service Regulations (32 C. F. R. §1622.14) provides:

"Class I-O: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of

the National Health, Safety, or Interest.—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces.

"(b) Section 6(j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

" 'Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.' "

The documentary evidence submitted by the appellant establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant military service which were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah.

In view of the fact that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: Was the holding by the

Selective Service Appeal Board (that the undisputed evidence did not prove appellant was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

There is absolutely no evidence whatever in the draft board file that appellant was willing to do military service. All of his papers and every document supplied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service.

Congress did not intend to confer upon the draft boards or the district judge arbitrary and capricious powers in the exercise of their discretion. They have discretion to follow the law when the facts are undisputed. If there is a dispute, the boards have the jurisdiction to weigh the testimony. In the case of a denial of the conscientious objector status, if there is no dispute in the evidence and the documentary evidence otherwise establishes that the registrant is a conscientious objector, it is the duty of the court to hold that there is no basis in fact. It must conclude that there is an abuse of discretion, and that the classification is arbitrary and capricious. It is submitted that such is the case here. The undisputed evidence shows that the appellant is a conscientious objector entitled to the I-O classification. The denial of the classification is without basis in fact. The classification of I-A flies in the teeth of the evidence. Such classification is a dishonest one, making it unlawful. (*Johnson v. United States* (8th Cir.), 126 F. 2d 242, at p. 247.)

There was no weighing of the evidence. The reason is that there was no conflict in the evidence on the conscientious objector claim. By answering the questions, filling out the form properly and supporting it by proper

papers petitioner discharged his burden of proof. The burden then shifted to the Government to contradict the statements appearing in his draft board file. The papers that he signed and filed were not mere claims. They were evidence. Petitioner could be prosecuted for falsely answering the questions. These statements made under the pain of liability for false swearing were not contradicted by the Government. Petitioner discharged his burden. The Government failed to meet its burden by rebutting the undisputed proof submitted by petitioner. The rule of *Dickinson v. United States* (1953), 346 U. S. 389, applies. (*Pine v. United States* (4th Cir., 1954), 212 F. 2d 93, 96; *Weaver v. United States* (8th Cir., 1954), 210 F. 2d 815, 822-823; *Jessen v. United States* (10th Cir., 1954), 212 F. 2d 897, 900; *United States v. Hartman* (2nd Cir., 1954), 209 F. 2d 366, 368, 369-370; *United States v. Pekarski* (2nd Cir., 1953), 207 F. 2d 930; *United States v. Wilson* (7th Cir., 1954), 215 F. 2d 443, 446.) That the *Dickinson* case, *supra,* dealt with the ministerial status and not the conscientious objector claim makes no difference.

In the *Estep* case, the Court said that, in reviewing draft board files, judges are not to weigh the evidence to determine whether the classification was justified. A Court weighs the evidence only when there is some contradiction in the evidence. There must be some dispute before this burden falls upon the Court to determine whether the classification is justified. The Court added, however, that if there is no basis in fact for a classification after a review of the file by a Court, it would be the duty of the Court to hold that the classification was beyond its jurisdiction. (327 U. S., at p. 122.)

There is no basis in fact for the classification in this case because there are no facts that contradict the documentary proof submitted by the appellant.

It is respectfully submitted that the motion for judgment of acquittal should have been sustained because there is no basis in fact for the classification given by the draft boards and the denial of the total conscientious objector classification was arbitrary and capricious. The judgment of the Court below should be reversed, therefore, and the trial court directed to enter a judgment of acquittal.

The undisputed evidence shows that appellant is sincere in his objections. He is opposed to any form of participation in war by himself. This objection comes from an immovable belief in the Supreme Being. It is not based on sociological, political or philosophical beliefs. It is supported by the direct Word of God, the Bible. It is not a limited objection that he has. He is not willing to join the army as a noncombatant soldier or go in as a conscientious objector only to actual combat service. He objects to doing anything in the armed forces. He will not be a soldier.

It was well known to the Congress, the nation, the Government and the Courts of the United States that Jehovah's Witnesses are conscientiously opposed to noncomtant military service. They were not unaware that these objections of Jehovah's Witnesses are based on a belief in the supremacy of God's law above the obligations arising from any human relationship. These facts bring Jehovah's Witnesses within the plain words of the act. Twisting the words of the law and discoloring the act subvert the intent of Congress not to discriminate.

The strict construction of the act advocated by the Government and the Court below was not intended by Congress; Congress had in mind a liberal interpretation of its provision for conscientious objectors to protect the religious objector. The records of the hearings in Congress, the reports and the act all prove a broad exemption was intended. Congress had in mind that objection to war is a part of the religious history of this country. Conscientious objection was recognized by Massachusetts in 1661, by Rhode Island in 1673 and by Pennsylvania in 1757. It became part of the laws of the colonies and states through American history. It finally became part of the national fabric during the Civil War and has grown in breadth and meaning ever since. (See Selective Service System, Conscientious Objection, Special Monograph No. 11, Vol. I, pp. 29-66, Washington Government Printing Office, 1950.) So strongly was the principle that President Lincoln and his Secretary of War thought that conscientious objectors had to be recognized. This is impressed upon by the Special Monograph No. 11, Vol. I, *supra,* at page 43:

> "At the end of hostilities Secretary of War Stanton said that President Lincoln and he had 'felt that unless we recognize conscientious religious scruples, we could not expect the blessing of Heaven.' "

As appears above, the Selective Service System in Special Monograph No. 11, Vol. 1, carries the history far back, even before the American Revolution. (*Ibid.,* pp. 29-35.) Virginia and Maryland exempted the Quakers from service. (*Ibid.,* p. 27.) From the Revolution to the Civil War provision for exemption of conscientious objectors appears in the state constitutions. During the Civil War the military provost marshal was authorized

to grant special benefits to noncombatants under Section 17 of the act, approved February 24, 1864. Lincoln was urged to force conscientious objectors into the army. He replied:

> "No, I will not do that. These people do not believe in war. People who do not believe in war make poor soldiers. . . . These people are largely a rural people, sturdy and honest. They are excellent farmers. The country needs good farmers fully as much as it needs good soldiers. We will leave them on their farms where they are at home and where they will make their contributions better than they would with a gun." (*Ibid.,* pp. 42-43.)

Congress certainly must have had in mind the historic national policy of fair treatment to conscientious objectors. The well-known governmental sympathy toward the Quakers and others was not ignored by Congress when the act was passed. Congress must have had in mind the historic considerations enumerated by the Supreme Court in *Girouard v. United States,* 328 U. S. 61. (Read 328 U. S. at pp. 68-69.)

In passing the provisions for conscientious objection to war in all the draft laws Congress had this long history in mind. It intended to preserve the freedom of religion and conscience in regard to conscientious objection, and it provided a law whereby such freedom could be preserved.

In the recommendation of the Department of Justice dated December 6, 1954 attaching résumé of the F. B. I. report, and made a part of the recommendation, it makes the statement that registrant (appellant) did not base his claim on the teachings or doctrines of Jehovah Witnesses, nor any other organization or denomination and

obviously was taken from a piecemeal statement appellant made to said hearing officer. We refer your honorable attention throughout the whole file of registrant (appellant) and particularly to appellant's "Special Form for Conscientious Objector" where he states he has attended Covington, Kentucky Company of Jehovah Witnesses for the last ten years. It is not clear then why the Hearing Officer found that appellant based his teachings and religious beliefs upon his own moral code, his own personal moral philosophy, and his own sociological views, founded upon his interpretation of and conclusions from his study of the Bible. The finding of the hearing officer is without basis in fact. The résumé of the F. B. I. report dated June 15, 1954 contains more favorable evidence and some unfavorable evidence which boiled down amounts to a few boyhood episodes during school days mostly such as working for a brewery, drinking beer, having fisticuffs with another boy over a girl, a traffic violation, and being "wild", and having a pen knife in his hand on one occasion before an altercation. From what the Justice Department states in its letter on file, "The impression is given by the hearing officer that he served 10 days in jail for traffic violation" which is refuted by appellant and not true. The truth is the sentence was suspended. See letter of appellant in file refuting above dated August 15, 1955. After reading the favorable evidence it is difficult to see what is meant by being "wild". All of the episodes occurred while he was a boy and a very young man, and most of them many years ago.

Since then he has married, settled down, has a child, works steadily, attends church regularly and has received a certificate from his congregational head that he is in good standing as a Jehovah Witness, which certificate

has been filed with the local board. These episodes mostly from his boyhood days have no bearing on his religious faith, belief, and sincerity now, and can happen to any boy. A single conviction for drunkeness is recorded against appellant. "We are all children of Eve". Similar situation as to drinking in the case of *William Chernekoff, Jr. v. United States of America,* 219 F. 2d 721 (9th Cir.), February 24, 1955.

QUESTION TWO.

Was Appellant Illegally Denied His Right to an Investigation, a Hearing, a Report by a Hearing Officer and a Recommendation by the Department of Justice to the Board of Appeal Upon the Conscientious Objector Claim Contrary to Section 6(j) of the Act and Regulations?

The Trial Court says "No".

The Government says "No".

The appellant says "Yes".

The record shows that on July 20, 1955, for the first time appellant received a copy of the Department of Justice recommendation of December 6, 1954. This was too late for the second hearing on appeal about January 12, 1955, so Local Board seeing the fatal error again reopened said appellant's case and appellant was again classified as I-A by the Board of Appeals September 28, 1955, this time without a hearing before the hearing officer of the Justice Department, without a résumé of the F. B. I. report and without a recommendation from the Department of Justice.

The failure on the part of the appeal board to have the conscientious objector claim investigated, reported upon and a recommendation made by the Department of

Justice denies procedural due process contrary to Section 6(j) of the Universal Military Training and Service Act and Section 1626.25 of the Regulations on his third appeal.

Section 6(j) of the Universal Military Training and Service Act reads:

> "Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the president, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board."

Sections 1626.25 and 1626.26 of the regulations (32 C. F. R. §§1626.25 and 1626.26) before June 17, 1952, provided:

> "1626.25. *Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.*—(a) If an appeal involves the question

whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

"(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

"(2) *If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.*" (Emphasis added.)

"(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service

in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-O. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class I-O, but does find that the registrant is eligible for classification in Class I-O, it shall place him in that class.

"(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) No registrant's file shall be forwarded to the United States Attorney by any appeal board and *any file so forwarded shall be returned, unless in the 'Minutes of Action by Local Board and Appeal Board' on the Classification Questionnaire (SSS Form 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in subparagraphs (2) or (4) of paragraph (a) of this section.*" (Emphasis added.)

"(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Depart-

ment of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice and the report of the hearing officer of the Department of Justice.

"1626.26. Decision of Appeal Board.—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the president is taken; provided, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

The denial of a hearing provided for by the regulations before draft boards is a denial of due process. (*United States v. Peterson,* 53 Fed. Supp. 760 (N. D. Calif. S. D.); *United Ctates v. Laier,* 52 Fed. Supp. 392 (N. D. Calif. S. D.); *United States v. Fry,* 203 F. 2d 638 (2nd Cir.); *Davis v. United States,* 199 F. 2d 689 (6th Cir.); compare *Knox v. United States,* 200 F. 2d 398 (9th Cir.).)

General Lewis B. Hersey, in the publication entitled "Conscientious Objection" said:

> "The Department of Justice and Selective Service took the position that each time the case of a registrant who claimed to be a conscientious objector came before a board of appeal, the case must be referred to the Department of Justice for its recommendation. This was felt to be the direct application of the law. In addition such reference was necessary because new factors in the case might be brought to light by the Department's investigation and hearing. . . ." (Emphasis added.) (See Selective Service System, Conscientious Objection, Special Monograph No. 11, Vol. I, pp. 147, 150, 155, Washington, Government Printing Office, 1950.)

Since the right to the investigation flows from the taking of the appeal, it is absolutely mandatory that the inquiry and hearing be conducted by the Department of Justice in every case where there is an appeal to the appeal board and where a claim for classification as a conscientious objector is involved in such appeal, regardless of prior investigations.

The undisputed evidence shows that upon the appeal of the case to the appeal board on the last and third appeal of appellant and *after new and additional evidence*

was submitted to the board consisting of a certificate from the congregational head of the Jehovah Witnesses showing appellant to be in good standing as a member of his congregation, no hearing was conducted by the Department of Justice as to appellant's conscientious objector claim, pursuant to Section 1626.25 of the regulations as amended by Executive Order of the President No. 10,363, Volume 17, Federal Register No. 119, Wednesday, June 18, 1952, pages 5449 to 5452, in conflict with the act, and it deprived appellant of a full and fair consideration by the appeal board, thus nullifying the entire draft board proceedings.

AUTHORITIES:

United States v. Frank, N. D. Calif. N. D., No. 33546, June 16, 1953;

Sterrett v. United States (9th Cir., Oct. 25, 1954), 216 F. 2d 659;

United States v. Cotie (N. D. N. Y., 1953), 114 Fed. Supp. 28.

The appeal board deprived defendant (appellant) of procedural due process of law when appellant's case was not referred to the Department of Justice on the third appeal for appropriate inquiry and hearing as to his current conscientious objector claim, contrary to Section 6(j) of the act and Section 1626.25 of the regulations.

AUTHORITIES:

50 U. S. C. App. Sec. 456(j), 65 Stat. 83;

32 C. F. R. Sec. 1626.25.

It is submitted that the failure to conduct an investigation, make a report after an oral hearing and send a

recommendation to the appeal board by the Department of Justice deprived appellant of his procedural rights contrary to Section 6(j) of the act.

Wherefore the appellant prays that a judgment of acquittal be entered by this Court declaring the draft board order to report for induction void and indictment dismissed.

Date: March 28, 1957.

Respectfully submitted,

EDGAR G. WENZLAFF,

Attorney for Defendant-Appellant.